United States Court of Appeals

for the Second Circuit

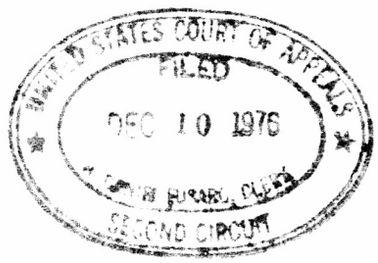
BRIEF FOR APPELLEE

76-7422

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



REGINALD V. SCHMIDT,

Plaintiff-Appellant,

vs.

RAYMOND T. McKAY and JOHN F. BRADY, representatives of a class of persons who were members of District 2—Marine Engineers Beneficial Association—AFL-CIO in September 1971,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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INDEX

PAGE

Issues Presented for Review 2

Statement of the Case 2

1. Nature of the Case 2

2. Course of Proceedings 5

3. Disposition of the Court Below 7

Statement of Facts 8

POINT I

The alleged promises of appellees, if valid, were enforceable on and after November 16, 1966 since they were in actuality or effect promises to pay money 12

POINT II

The alleged breach of contract was not anticipatory 22

POINT III

Appellees are not equitably estopped from asserting the bar of the statute of limitations at any time prior to plaintiffs purported discovery of the breach of the agreement 25

POINT IV

The court below had a basis in fact and law for finding that appellant had an obligation to seek a certification of his pension credits from the pension plan on November 16, 1966 if he wished to enforce the alleged agreement made by appellees with him within the applicable statute of limitations 29

PAGE

POINT V

Appellant sustained damage and hence had a cause of action as soon as he completed his picket duty in Mobile, Alabama on November 16, 1966 33

POINT VI

The District Court correctly found that Reginald Schmidt could have discovered the fraud with reasonable diligence commencing November 16, 1966 .. 38

POINT VII

Assuming, solely *arguendo*, the validity of appellant's second cause of action for promissory estoppel, the District Court correctly dismissed this cause of action since it was commenced after the applicable New York statute of limitations had run 44

CONCLUSION 47

TABLE OF AUTHORITIES

Cases:

Brockhurst v. Ryan, 2 Misc. 2d 747 (S. Ct. N.Y. Cty. 275 (1937) 17

Cary v. Koerner, 200 N.Y. 253 37

City of New York v. New York Central Railroad Co., 275 (1937) 17

Continental Bank and Trust Co. v. Scotch Presbyterian Church, 64 N.Y. Supp. 2d 24 (1946) 14

Curren v. Hosey, 153 AD 557 (1912) 14

PAGE

Edlux Construction Corp. v. State of New York, 252 App. Div. 373 (1937), *affirmed*, 277 N.Y. 635 (1938) 16, 24, 25, 37

Erbe v. Lincoln Rochester Trust Company, 3 N.Y. 2d 324 (1957) 41, 42

Erbe v. Lincoln Rochester Trust Company, 13 A.D. 2d 211 (4th Department 1961) 26, 27

Erie v. Tompkins, 304 U.S. 64 (1938) 13

Ga Nun v. Palmer, 202 N.Y. 483 (1911) 22, 23

Gardner v. Toilet Goods Association, 387 U.S. 167 (1967) 35

Gilbert v. Meyer, 362 F. Supp. 168 (S.D.N.Y. 1968) .. 45

Higgins v. Crouse, 147 N.Y. 411 (1895) 27, 28, 42, 43

Hobart v. Verrault, 74 AD 444 (1902) 14

Hochester v. De la Tour (2 Ellis & Blackburn, 678) .. 22, 23

Howard v. Daly, 61 N.Y. 362 (1875) 22

Lewis v. Lewis, 59 Misc. 2d 525 (N.Y. City Civil Court, 1969) 33, 37

Lowe v. Feldman, 11 Misc. 2d 8 (S. Ct. N.Y. Cty. 1957) 31

Mason v. Alston, 9 N.Y. 28 (1853) 28

Moglia v. Geoghegan, 267 F. Supp. 641 (S.D.N.Y. 1967), *affirmed*, 403 F.2d 110 (2d Cir. 1968), cert. denied 394 U.S. 919 (1969) 17, 29, 44

Pine v. Okonieski, 256 A.D. 519 (4th Dept. 1939) 17

Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949) 12

PAGE

Railway Express Agency, Inc. v. Gleason, 2 Misc. 2d 368 (1956) 29

Rutland House Associates, Respondent v. Philip B. Dannof, Appellant, 37 App. Div. 2d 828 (1st Dept. 1971) 41

Ryan Ready Mixed Concrete Corp. v. Coons, 25 A.D. 2d 530 (2nd Dept. 1966) 26, 33, 37

Smith v. Varra, 136 Misc. 500 (1930) 28

United Steelworkers of America v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) 5, 6

Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) 35

Statutes and Rules:

CPLR §213 ..... 13, 39, 40, 44

Diversity Jurisdiction Statute, 28 USC §1332 12

Federal Rules of Civil Procedure: Rule 23.2 5

21 N.Y. Jur. Estoppel, Ratification and Waiver, Section 15 ..... 28, 29, 45

36 N.Y. Jur. Limitations and Laches, Section 71 14

Authorities:

2 Carmody-Wait 2d, Section 13:154 15-16

2A Moore's Federal Practice, ¶12.08 35

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-7422

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REGINALD V. SCHMIDT,

Plaintiff-Appellant,

- against -

RAYMOND T. McKAY and JOHN F. BRADY, as representatives of a class of persons who were members of District 2-Marine Engineers Beneficial Association, AFL-CIO in September, 1971,

Defendants-Appellees.

----------x

On Appeal from United States District Court

For the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLEES RAYMOND T. McKAY and JOHN F. BRADY, as representatives of a class of persons who were members of District 2-Marine Engineers Beneficial Association, AFL-CIO in September, 1971

This is an appeal from an Order of the Hon. Walter Bruchhausen dismissing the second amended complaint in the above entitled action in its entirety on the grounds that each of the causes of action set forth in the second amended complaint: to wit, breach of contract, promissory estoppel and fraud or

misrepresentation, were barred by the six year statute of limitations under New York Law.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in dismissing the first cause of action for breach of contract in the second amended complaint when the Court found that the action, if any, accrued on November 16, 1966 and was commenced by the filing of a complaint in the District Court on November 27, 1972, eleven (11) days after expiration of the six year statute of limitations applicable under New York Law?

2. Did the District Court err in dismissing the second cause of action in promissory estoppel in the second amended complaint when the Court found that the action, if any, accrued on November 16, 1966 and was commenced by the filing of a complaint in the District Court on November 27, 1972 eleven (11) days after expiration of the six year statute of limitations applicable under New York Law?

3. Did the District Court err in dismissing the third cause of action for misrepresentation or fraud in the second amended complaint when the Court found from the evidence in the record, that the fraud, if any, could have been discovered with reasonable diligence on November 16, 1966, but was commenced by the filing of a complaint in the District Court on November 27, 1972, eleven (11) days after the expiration of the six year statute of limitations applicable under New York Law?

STATEMENT OF THE CASE

1. Nature of the Case

The second amended complaint sets forth causes of action in breach of contract, promissory estoppel and fraud. (10a, 11a, 12a).

The defendants, Raymond T. McKay and John F. Brady, are sued in their representative capacity as President and Secretary-Treasurer, District 2 Marine Engineers Beneficial Association, AFL-CIO (MEBA), an unincorporated association with Headquarters in Brooklyn, New York. (21a, 22a, 23a).

The class consists of all members of District 2-Marine Engineers Beneficial Association - AFL-CIO in September 1971 including the named defendants who have been determined by the District Court to be adequate representatives of the class. (6 a,21 a,22 a, 23 a)

From May 1958 the plaintiff-appellant had been a member in good standing of the MEBA to the date of the filing of the original complaint herein. (14 a) During the period of Reginald Schmidt's membership in good standing in District 2-Marine Engineers Beneficial Association, AFL-CIO, the President and Secretary-Treasurer of MEBA sought the active support of Reginald Schmidt and all other engineers employed by Cities Service Tanker Corporation in the campaign of MEBA to organize licensed marine engineers employed aboard the vessels of that employer. (15 a)

In May 1966 the President and Secretary-Treasurer of MEBA allegedly gave certain oral and written assurances to plaintiff which plaintiff purportedly relied upon in May and October, and early November 1966. (7 a, 8 a, 9 a, 15 a)

The specific nature of the so-called promises and misrepresentations of the President of MEBA can be found in letters annexed to the complaint, which are incorporated by reference in the second amended complaint herein, and provide, inter alia, as follows:

"A) District 2 - MEBA will satisfactorily conclude with the Trustees of the District 2-MEBA Pension Plan an arrangement permitting the Plan to pick up all the past service credits of any Engineer who supports District 2 MEBA in its current action against the violation of election agreements -- regardless of how this action comes out.

B) District 2 - MEBA further guarantees that in the unlikely event that A) above is not accomplished by the Trustees' action, District 2 - MEBA will make the appropriate contributions in behalf of said Engineers supporting District 2 - MEBA in this action, with the result that the past service credits of the Engineers supporting District 2 - MEBA will be totally accredited to their accounts for pensions from the District 2 - MEBA Pension Plan."

Basedon the written communication of President McKay to Reginald Schmidt, as quoted supra , Schmidt allegedly took over the direction of a picket line in behalf of MEBA at the SS "Bradford Island", a Cities Service vessel docked at Mobile, Alabama, during the period from October 26, 1966 to November 16, 1966, for the alleged purpose of supporting MEBA in its organizing campaign. (9 a) This action,in which Reginald Schmidt participated,allegedly prevented the vessel from sailing for at least three (3) weeks and permitted MEBA to allegedly successfully organize the engineers and mates on the "Bradford Island". (9 a)

Following the conclusion of Schmidt's picket duty at or in the vicinity of the "Bradford Island" in Mobile, Alabama, he elected not to continue in his employment with Cities Service Tanker Corp., and commenced employment as a licensed engineer under collective agreements between MEBA and various vessel operators. (9 a, 10 a, 51 a, 66 a-72 a).

Thereafter, in 1971 Schmidt submitted an application to the District 2 MEBA Pension Plan. (10 a, 15 a, 16 a, 2 a) Schmidt's application for a pension in February, 1971 was rejected on the ground that at the time he had only four (4) years accredited service, and required twenty (20) years accredited service to qualify for a normal pension. (82 a)

On November 27, 1972 Schmidt's counsel filed the initial complaint in this action in the U. S. District Court for the Eastern District of New York. (1 a, 2 a).

2. Course of Proceedings

This action was initiated on November 27, 1972 with the filing of the complaint. (1 a, 2 a) On May 16, 1973 the District Court dismissed the action on defendant's Motion to Dismiss because the Court lacked subject matter jurisdiction on the authority of United Steelworkers of America v. R.H.Bouligny Inc., 382 U.S. 145 (1965). (2 a)

Following dismissal of the original complaint in the Eastern District, Reginald Schmidt appealed to this Court, and on January 31, 1974 this Court affirmed the dismissal of the District Court, but vacated the judgment of the District Court and remanded this matter to the District Court with leave to amend the complaint.(Docket No. 73-2047, 2 a)

On April 18, 1974, Reginald Schmidt filed a first amended complaint adding a new paragraph purportedly alleging a class action against defendants, McKay and Brady, as representatives of a class, pursuant t Rule 23.2 of the Federal Rules of Civil Procedure.

On October 22, 1974 defendants filed a Motion to Dismiss the amended complaint for lack of subject matter jurisdiction. On November 27, 1974 the District Court granted the Motion to Dismiss relying again on the decision of the Supreme Court in United Steelworkers of America, AFL-CIO v. R.H. Bouligny Inc., supra. (3 a).

Reginald Schmidt's counsel thereafter applied for re-argument. On reargument the District Court then granted leave to file a second amended complaint on January 9, 1975. (3 a)

On August 11, 1975 the District Court entered an Order that this action could proceed as a class action with defendants McKay and Brady determined to be adequate representatives of the class of all defendants, and further ordered that all claims against the individual defendants, McKay and Brady, were dismissed. (4 a, 21 a, 22 a, 23 a)

In November, 1975 defendants moved for summary judgment and to dismiss on the grounds, inter alia, that each cause of action in the second amended complaint was barred by the applicable statute of limitations. (4 a)

On August 9, 1976 the District Court dismissed the second amended complaint and thereby granted the motion of the defendants on the grounds that all cause of actions set forth in the second amended complaint were time barred. (4 a, 24 a, 25 a, 26 a, 27 a, 28 a, 29 a, 30 a)

3. Disposition of the Court Below

The Order of the Court below dismisses the three causes of action asserted in the second amended complaint herein, finding that with respect to the cause of action for breach of contract, promissory estoppel and fraud, the statute of limitations of six (6) years applicable under New York law to the three causes of action,commenced running on November 16, 1966, and that the complaint originally filed in this matter was untimely filed on November 27, 1972.(24 a, 25 a, 26 a, 27 a, 28 a, 29 a, 30 a)

With respect to the first cause of action founded upon contract, the Court noted that the plaintiff's opporutnity to enforce the alleged agreement with defendants:

> "...commenced on November 16, 1966, the date when the strike action concluded successfully for MEBA in organizing the engineers and mates aboard the vessel SS "Bradford Island". The Plaintiff had every right to attempt enforcement of the defendants alleged promises as early as November 16, 1966. He was free to attempt enforcement of the defendants alleged promises to provide plaintiff with full credit for his past service. He was free to commence an action immediately upon his fulfillment of picket duty in Alabama. His obligation was to seek a certification from the Pension Plan which would have informed the plaintiff of his credits, and then be able to sue for credits for past service if denied by virtue of the alleged promises of the defendants." (28 a, 29 a)

The Court also found that the second cause of action based upon the doctrine of promissory estoppel, was subject to the six (6) year statute of limitations commencing November 16, 1966. (29 a)

With respect to the third cause of action, founded upon fraud and misrepresentation, the Court concluded that the facts in the record, based on the deposition of Reginald Schmidt, and the pleadings, clearly indicated that fraud, if any, could have been discovered with reasonable diligence commencing November 16, 1966. (29 a)

STATEMENT OF FACTS

As noted, supra, Reginald Schmidt has alleged three (3) causes of action in this case. The first cause of action is alleged to be one for breach of contract. (10 a) The second cause of action is in the nature of an equitable action under the doctrine of promissory estoppel. (11 a) The third cause of action is one in the nature of fraud or misrepresentation. (11 a, 12 a)

It is a matter of record and beyond dispute that each of these claims as contained in the original complaint heretofore filed herein, first arose in May 1966, when, by virtue of an alleged telephone call (7 a), and written communications from Appellee McKay, written on May 12, 1966 and May 26, 1966, wherein Appellee McKay allegedly gave certain commitments to Reginald Schmidt, which Reginald Schmidt purportedly relied upon in May and October and early November 1966. (7 a, 9 a, 10 a)

The written commitments contained in the letter of defendant McKay dated May 12, 1966 states as follows:

* * * *

"Despite these occurrences (Cities Service's breaches of promise), however, District 2 makes the following additional commitment to all the Engineers employed by the Cities Service Tankers Corp.:

A) District 2 MEBA will satisfactorily conclude with the Trustees of the District 2 MEBA Pension Plan an arrangment permitting the Plan to pick up all the past service credits of any Engineer who supports District 2 MEBA in its current action against the violation of the election agreements--regardless of how this action comes out.

B) District 2 MEBA further guarantees that in the unlikely event that A) above is not accomplished by the Trustees' action, District 2 MEBA will make the appropriate contributions in behalf of said Engineers supporting District 2 MEBA in this action, with the result that the past service credits of the Engineers supporting District 2 MEBA will be totally accredited to their accounts for pensions from the District 2 MEBA Pension Plan. " (8 a)

In the letter dated May 26, 1966 defendants McKay and Brady emphasized:

* * * *

"Should the Company (Cities Service) refuse to agree to fair election conditions and permit the election to progress without prejudicial interference, we will then institute our original plan and take the necessary action to protect the engineers that have expressed their desire for District 2 MEBA representation.

We sincerely hope this regrettable action will not be necessary, but if it is, then the terms, commitments and conditions for the COUNCIL GROVE Engineers (as set forth in the letter of May 12) will apply to all Cities Service Engineers." (9 a).

Reginald Schmidt alleges that in apparent reliance on the above stated communications made by defendants McKay and Brady, he took over the direction of a picket line on behalf of MEBA at the SS "BRADFORD ISLAND", a Cities Service vessel docked at Mobile, Alabama, during the period from October 26, 1966 to November 16, 1966 (9 a).

When the picket duty performed by Reginald Schmidt was concluded on November 16, 1966, he testified that he believed a contract had been consummated between himself and the members of District 2 MEBA at that time. (Deposition of R. Schmidt, p. 97).

Schmidt thereafter determined for his own reasons, that despite his concurrent membership in both MEBA and the independent labor organization which represented the engineers in the Cities Service fleet, D.O.A.* that he would thereafter work under District 2 MEBA contracts. Having been an MEBA member since 1958 Schmidt was familiar with the requirements of the District 2 MEBA Pension Plan and knew at the time that in order to accrue pension credit he had to work in employment with District 2 contracted employers. (48 a, 51 a, 60 a, 61 a, 62 a, 63 a, 64 a, 65 a, 66 a).

On September 22, 1967 Schmidt wrote a letter to defendant Brady in which he noted that Cities Service:

> "...has the rumor spread around that the union has refused to pick up my time with Cities Service for retirement and I told them this was all a big lie. I wonder if it would do any good to get my time checked by the Coast Guard and have the union certify my time for retirement and write down the amount I would receive after 23, 24 and 25 years." (78 a, 79 a)

*Deepwater Officers Association.

However, despite Schmidt's admitted awareness of the requirements to obtain pension credit under the District 2 MEBA Pension Plan as early as May 12, 1966, and in his inquiry to MEBA Secretary-Treasurer Brady in 1967 (to which no response was given), Schmidt made no attempt to ascertain the amount of his pension credits prior to his application for retirement which was filed with the District 2 MEBA Pension Plan in February, 1971. (81 a-84 a).

The District 2 MEBA Pension Plan is a jointly administered Taft-Hartley Trust having an equal number of Trustees designated by employers under contract to District 2 MEBA and the union (83 a).

From the conclusion of Schmidt's participation in the picketing of the vessel "BRADFORD ISLAND" in late October and early November, 1966 through February, 1971, Schmidt had accrued only four (4) years of credited service under the District 2 MEBA-AMO Pension Plan.* (82 a).

Although Reginald Schmidt had been a member of MEBA since at least 1958 and had been fully aware of the requirement to

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*As a result of an agreement between a successor to Cities Service Tankers and District 2, MEBA effective January 1, 1976 the Trustees of the District 2 MEBA Pension Plan were able to reconsider Mr. Schmidt's application of a pension, and grant him a pension effective January 1, 1976 in the amount of $425.38 per month. (83 a). However, the Trustees did not grant Reginald Schmidt retroactive pension payments for the period April 1, 1971 to December 31, 1975. (83 a). These actions resulted in a stipulation executed by counsel for Reginald Schmidt and counsel for Appellees which was approved by the District Court and reduced the actual damage claim of Reginald Schmidt to $24,672.04 and eliminated the original claim for punitive damages contained in the second amended complaint herein. (19 a, 20 a, 12 a, 83 a).

accrue pension credits under the District 2 MEBA Pension Plan since at least May 12, 1966, he made no effort to ascertain the amount of his pension credit at or prior to his application for retirement filed with the District 2 MEBA Pension Plan in February, 1971. (81 a, 82 a, 83 a, 84 a).

Following denial of Schmidt's application for pension in 1971 (82 a) his counsel commenced suit on November 27, 1972. (1 a, 2 a).

POINT I

THE ALLEGED PROMISES OF APPELLEES, IF VALID, WERE ENFORCEABLE ON AND AFTER NOVEMBER 16, 1966 SINCE THEY WERE IN ACTUALITY OR EFFECT PROMISES TO PAY MONEY.

The District Court, ~~in~~ concluded that the Statute of Limitations commenced to run on November 16, 1966, when Reginald Schmidt fulfilled the conditions or contingencies to enable the alleged agreement asserted in the first cause of action in the second amended complaint to become operative. (26 a-29 a, 7 a, 8 a, 9 a, 10 a, 11 a.

The second amended complaint herein was commenced in the District Court under the Diversity Jurisdiction Statute, 28 USC §1332. (5 a).

For many years the rule in the federal courts has been that in applying a statue of limitations in a diversity case, state law as to when an action is commenced, controls. Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949). Another well established principle of federal law is that federal courts,

in diversity cases, may not, as to non-federal matters, disregard state law in matters of substantive rights. Erie v. Tompkins, 304 U.S. 64 (1938).

Given these well established concepts of federal law, an examination of CPLR §213 reveals that the following actions must be commenced within six (6) years:

> "2. An action upon a contractual obligation or liability express or implied, except as provided in Article 2 of the Uniform Commercial Code;..."

Applying the New York Statute of Limitations quoted, supra, to the first cause of action contained in the second amended complaint herein, it is obvious that CPLR §213 required that Reginald Schmidt commence the first cause of action contained in the second amended complaint within six (6) years after it had accrued, on November 16, 1966.

The court below found no action was commenced within six (6) years after Reginald Schmidt contended in his deposition a binding contract existed between himself and Appellees, McKay and Brady, as representatives of a class of members of District 2 MEBA. (28 a, 29 a).

In Reginald Schmidt's deposition on page 97, he testified as follows:

> Question: "Can you state for me a date when you feel this contract was binding upon the class, if you know?
>
> Answer: When I did my picket duty aboard that vessel--not aboard that vessel; at the foot of it, in the dock.

Question: Which was in October or November, 1966?

Answer: That is correct.

Question: And you understand your testimony to be that at that time there was a contract between you and the members of District 2 MEBA?

Answer: Yes."

Assuming, arguendo, that the contract Appellant had with the Appelles was as set forth in paragraph 8 of the second amended complaint, that is, to conclude with the Trustees of the MEBA Pension Plan an arrangement whereby Reginald Schmidt be included in the Pension Plan with full credit for all prior service or make the appropriate contributions on behalf of plaintiff with the result that he would be included in the Pension Plan with full credit for all prior service (8 a), there can be no dispute that this contract was conditional in nature and, as such, the cause of action accrued when the condition was complied with. That condition was Reginald Schmidt's performance, in accordance with such promises, which Reginald Schmidt contends was accomplished no later than November 16, 1966. (9 a).

In such circumstances, where a contract prescribes a condition or contingency to be complied with the law of New York is that the cause of action does not accrue until a contingency occurs or the condition is complied with. 36 N.Y. Jur. Limitations and Laches, Section 71. Continental Bank and Trust Co. v. Scotch Presbyterian Church, 64 N.Y. Supp. 2d 24 (1946); Hobart v. Verrault, 74 AD 444 (1902); Curren v. Hosey, 153 AD 557 (1912).

Appellees concede that if there was a contract in this case it was a contingent contract or a conditional contract and the cause of action on that contract could not possibly accrue until such time as the condition or contingency was fulfilled. The condition or contingency being Reginald Schmidt's performance in accordance with the alleged promise or promises of the Appellees, Raymond T. McKay and John F. Brady.

The time fixed for performance by the Appellees can be said to have commenced no later than November 16, 1966 when Reginald Schmidt fulfilled the purported conditions of the alleged agreement set forth, supra, p. 9. Since Reginald Schmidt did not commence this action to enforce the alleged contract until November 27, 1972, the Statute of Limitations applicable to this cause of action has run and this Court must affirm the dismissal of this cause of action as a matter of law.

The law of New York is well established with respect to the question as to when the Statute of Limitations begins to run in a breach of contract action:

> "The general rule that the statute of limitations begins to run from the time the right of action accrues applies to actions on contracts. This ordinarily is the time of the breach of the agreement, rather than the time that actual damages are sustained as a result of the breach. Knowledge of the occurrence of the wrong on the plaintiff's part is not necessary to start the statute of limitations running as to a contract action, and a cause of action arises when and where the breach of contract occurs, even

> though the place of contracting is elsewhere." 2 Carmody-Wait 2d, Section 13:154. (Emphasis added). (Footnotes omitted).

In Edlux construction Corp. v. State of New York, 252 App. Div. 373 (1937), affirmed, 277 N.Y. 635 (1938), the Appellate Division, Third Department emphasized that:

> "...the Statute of Limitations does not begin to run until there is opportunity to enforce the obligation." 252 App. Div., at 374.

Applying this test to the facts herein, there is no question that Reginald Schmidt's opportunity to enforce the alleged contractual obligation described, supra, p. 4, began to run at the time Reginald Schmidt allegedly fulfilled the conditions precedent to imposition of liability against Appellees McKay and Brady, as representatives of the class of members of District 2 MEBA, that is, November 16, 1966.

Appellant urges that the District Court reached the incorrect conclusion that plaintiff was entitled to bring an action immediately after the picketing ended in Mobile on November 16, 1966, because appellees had a reasonable time within which to perform their part of the agreement. Appellant's Brief, pages 10 and 11.

In support of this contention Appellant argues that "here is ample precedent in actions involving contracts to perform services or take actions other than the simple payment of money, where the time for performance is not specified, to hold that the Statute of Limitations does not begin to run until a reasonable time

for performance has elapsed, citing Brockhurst v. Ryan, 2 Misc. 2d 747, (S. Ct. N.Y. Cty. 1955), City of New York v. New York Central Railroad Co., 275 (1937); and Pine v. Okonieski, 256 A.D. 519 (4th Dept. 1939).

The short answer to this contention is that the alleged agreement between Reginald Schmidt and Appellees McKay and Brady, did not involve the requirement that Appellees McKay and Brady perform services or take actions other than the simple payment of money.

The agreement of Appellees McKay and Brady was that District 2 MEBA would either conclude with the Trustees of the District 2 MEBA Pension Plan an arrangement permitting the Plan to pick up all the past service credits of any engineer who supports District 2 MEBA in its current action against violation of election agreements or, in the event this was not accomplished, by District 2 MEBA making the appropriate contributions in behalf of the engineers who supported District 2 MEBA in its action with the result that the past service credits of the engineers supporting MEBA would be totally accredited to their accounts for pensions from the District 2 MEBA Pension Plan. (8 a).

Leaving aside the questions of legality and impossibility of performance of such an agreement,* close scrutiny of the alleged promises in question demonstrates that either alternative involved the arrangement for the payment of money, either directly by MEBA, or indirectly by contributions being made in behalf of the engineers

*See Moglia v. Geoghegan, 403 F.2d. 110 (2d Cir. 1968).

in question by one or more employer signatories to the District 2 MEBA Pension Plan. (8 a, 83 a).

Appellant suggests in his argument that the nature of Appellee's alleged promises was such as to provide Reginald Schmidt with a pension. Appellant's Brief, p. 12. In fact, there is simply no evidence, either in the second amended complaint with attached exhibits or the depositions of the Appellant or Appellees or otherwise which would indicate that the nature of the Appellee's promises was to provide Reginald Schmidt with a pension. The actual nature of the alleged promises of Appellees McKay and Brady was to provide for accrual of pension credits through agreement obtained with the Trustees of the District 2 MEBA Pension Plan, or by payment of the required contributions to fund the credits by MEBA itself. (8a, 9a).

Brockhurst v. Ryan, supra, relied upon by Appellant at page 11 of its brief is clearly inapposite, since the contract before the Court there involved a divisible contract and the factual situation in Brockhurst v. Ryan, supra, does simply not comport with the nature of the alleged promises found herein.

Pine v. Okonieski, supra, also relied upon by the Appellant actually supports the contention of the Appellees since it correctly states the law applicable to the alleged promises herein: that where there is a contract for the payment of money, which is made payable upon the happening of a contingency or upon the performance of the condition, such a contract becomes due and payable as soon as the contingency is fulfilled or the condition is performed. Pine v. Okonieski, supra, at 521.

Contrary to the assertion of Appellant at page 12 of his brief, that Appellees had no obligation under their alleged agreement with Reginald Schmidt other than to take the necessary steps to assure his past service accreditation prior to the disposition of his application for a pension, Appellees did have such an obligation if the alleged promises were, arguendo, valid, since the Appellant had an ample basis to seek relief against Appellees the amount of money required to fund his pension credits for past service. (81 a, 82 a, 83 a, 84 a).

As the Administrator of the District 2 MEBA Pension Plan stated in his affidavit, individuals who are employed as licensed marine engineers on oceangoing vessels, under contract to District 2 MEBA, are entitled to periodically obtain from the District 2 MEBA Pension Plan a certification by the Administrator of their earned pension credits as they accumulate. (82 a).

Certification of pension credits is extremely important and useful since a certification will enable the individual who receives same (and his beneficiaries) to rely on the certification to establish the amount of pension credits the individual has under the Plan's Trust Indenture and Rules and Regulations. (82 a).

With certification accomplished an individual can then determine for himself how much additional employment under District 2 MEBA contracts, if any, must be had to qualify for a normal pension (20 years credited service) or continue working in the industry for a longer period to secure pension benefits of greater value. (82 a, 83 a).

By declining to seek certification in November, 1966 and continuing in covered employment under MEBA contract until October, 1970, Reginald Schmidt accrued four (4) additional years of pension credit under the District 2 MEBA Pension Plan, but was ineligible for a pension. He thus worked from 1967 to 1970, for what at the time constituted no benefit to himself and, in fact, a detriment or harm to himself, since the pension credits he had accrued constituted breakage, which could be applied to the cost of other participants pensions until at least December 31, 1975. (81 a, 82 a, 83 a).

As the court below found, Reginald Schmidt had the right to seek certification of his pension credit no later than November 16, 1966, when the appellant fulfilled the conditions precedent to the effectiveness of the alleged agreement between himself and defendants McKay and Brady. (9 a, 28 a, 29 a).*

Appellant engages in complete speculation (Appellant's Brief, p. 13) and conjecture as to the time it would require to implement the alleged agreement entered into between Appellant and Appellees, McKay and Brady, to obtain a modification of the Plan, if necessary or legally permissible. This is simply second guessing, especially when the Trustees, by their disqualification manifested a refusal to accept any agreement or to permit union contributions for the service by Appellant on Cities Service Tanker Corp. vessels. Appellant attempts here to substitute his personal notions of "reasonable time" for the actual time involved. (83 a, 84 a).

*Schmidt was fully aware of the normal method of accruing pension credit as early as May 12, 1966. (48 a, 50 a).

Appellant's suggestion at page 13 of his brief, that the record does not disclose when it was established that the organizing effort was successful and that it was only at such time that the defendants duty to perform under the contract would have been ascertained is certainly contradicted by Appellant's position throughout this litigation that the effort (insofar as Appellant was concerned) was successful as of November 16, 1966. (9 a).

Appellant's counsel is less than candid when he suggests that he has no knowledge that the organizing effort was unsuccessful (Appellant's Brief, p. 13), since the deposition of Appellee John F. Brady, taken by Appellant's counsel, clearly reveals that the MEBA was unsuccessful in organizing the licensed engineers in Cities Service no later than the spring of 1966. (Deposition of John F. Brady, pp. 20, 21).

Appellant's contention that the time that Appellees' duty to perform under the contract would have to be ascertained only when it was established that the organizing effort was unsuccessful is also misplaced. If we accept such a contention this would mean that there would be no basis upon which Appellant could recover on the merits under the alleged contract contained in the first cause of action claiming breach of contract in the second amended complaint herein. This contention of Appellant provides the Court with an alternate basis for sustaining the dismissal of the Court below since it means the agreement never became operative.

POINT II

THE ALLEGED BREACH OF CONTRACT WAS NOT ANTICIPATORY.

Appellant attempts to logically extend his argument on the reasonable opportunity allegedly had by defendants-appellees to perform the agreement by suggesting that if:

> "...any breach did occur on November 16, 1966, it was merely anticipatory because defendants had a reasonable opportunity to perform their agreement through 1971. Consequently plaintiff was not required to bring an action until six years after September, 1971." Appellant's Brief, p. 14.

In support of this contention, Appellant relies on Ga Nun v. Palmer, 202 N.Y. 483 (1911); citing Howard v. Daly, 61 N.Y. 362 (1875) and Hochster v. De la Tour, (2 Ellis & Blackburn, 678).

Ga Nun v. Palmer, supra, relied upon by the Appellant is clearly distinguishable in that the New York Court of Appeals emphasized that under the agreement in question:

> "...the determination of the amount of... damages (was) uncertain and difficult to prove."

In this case the determination of the amount of Appellant's damages was definable and ascertainable from November 16, 1966 when Appellant fulfilled the conditions or contingency to the operativeness of the contract in question. As of that date his pension credits for his service prior to November 16, 1966 with Cities Service Tankers Corp. could readily and quickly have been ascertained. It was this service which Appellant was allegedly promised pension credit for in the District 2 MEBA Pension Plan.

There was nothing further for the Appellant to perform in futuro after November 16, 1966 if the alleged agreement, being sued upon herein, is deemed a valid and binding contract. The performance that was required as of November 16, 1966 was entirely that of Appellees.

Thus, Ga Nun v. Palmer, supra, is clearly distinguishable since the promise sued upon therein involved an executory contract, where the amount of damages was uncertain and difficult to prove rather than precise and readily ascertainable in the case of the pension credits promised by Appellees to Appellant to be accredited to his account in the District 2 MEBA Pension Plan.

Hochster v. De la Tour, supra, cited in Ga Nun v. Palmer, supra, offers no further principle of benefit to the Appellant in this matter since there again the contract in issue, was executory in nature. Here the acts to be performed by Appellees, that is, entry into an agreement with the Trustees of the District 2 MEBA Pension Plan, to provide Appellant with the pension credits to which he was entitled for service with Cities Service Tankers Corp. or the making of contributions by District 2 MEBA could have been done on November 16, 1966.

Appellant persists in intimating (Appellant's Brief, pp. 11 and 12) to this Court that the nature of the promise in issue involved a promise of a pension, but the slightest scrutiny of the documents in this record reveal that if there was a promise it involved a promise to provide pension credits for past service, not

a pension. When this distinction is kept in mind the result is obvious, the contract in issue, if, arguendo, there was such a contract, could have been performed on November 16, 1966. (8 a, 9 a, 28 a, 29 a.)

In Edlux Construction Corp. v. State of New York, 252 App. Div. 373 (1937), affirmed, 277 N.Y. 635 (1938), the Appellate Division, Third Department emphasized that:

> "...the Statute of Limitations does not begin to run until there is opportunity to enforce the obligation." 252 App. Div. at 374.

Applying this test to the facts herein, there is no question that Appellant's opportunity to enforce the alleged agreement described, supra, began to run at the time Reginald Schmidt fulfilled the conditions precedent to Appellees' liability becoming operative under the alleged agreement, that is November 16, 1966.

While Appellant has contended that no damages accrued until he sought and was denied a pension from the District 2 MEBA Pension Plan in 1971, the Appellant had every legal right to attempt to enforce the Appellees' alleged promises as early as November 16, 1966. Reginald Schmidt did not have to wait until he accrued a total of twenty (20) years pension credit (the minimum required for a normal pension) to attempt to enforce the alleged promises to provide him with credit for his past service with Cities Service Tankers Corp. The Statute of Limitations begins to run in New York in a contract action when a contract is breached

(November 16, 1966) or when one omits the performance of an obligation (November 16, 1966 and thereafter) even though damages may not accrue until a later date. Edlux Construction Corp., supra, at 374.

Appellant's argument that the contract was executory in nature should be rejected and the decision of the Court below dismissing the first cause of action in the second amended complaint, affirmed.

POINT III

APPELLEES ARE NOT EQUITABLY ESTOPPED FROM ASSERTING THE BAR OF THE STATUTE OF LIMITATIONS AT ANY TIME PRIOR TO PLAINTIFFS PURPORTED DISCOVERY OF THE BREACH OF THE AGREEMENT.

Appellant urges in POINT III of his brief, that equitable estoppel should apply to bar imposition of the statute of limitations defense in this situation where Appellant wrote to Appellee Brady on September 22, 1967 indicating that

> "...Cities Service has the rumor spread around that the union has refused to pick up my time with C.S. (Cities Service) for retirement and I told them (this) was all a big lie. I wonder if it would do any good to get my time checked by the Coast Guard and have the union certify my time for retirement and write down the amount I would receive after 23, 24 and 25 years."(79 a) (Words in parenthesis added).

Appellant argues that Appellee Brady's silence in the face of Appellant's communication had the effect of reinforcing Appellant's confidence and lulling him into a continued belief that he would receive what he had allegedly been promised. Appellant's Brief, page 15.

In such circumstances, according to Appellant, the Appellee should be equitably estopped from asserting that the Statute of Limitations commenced running anytime before 1971. Appellant's Brief, page 15.

Initially, it should be noted that Appellant's bald assertion regarding the effect of Appellee Brady's silence on Appellant, following Appellant's communication with Appellee Brady on September 22, 1967, is pure conjecture and speculation and should not be countenanced by this Court.

Moreover, while the decision relied upon by Appellant in Erbe v. Lincoln Rochester Trust Company, 13 A.D. 2d 211 (4th Department 1961) and Ryan Ready Mixed Concrete Corp. v. Coons, 25 A.D. 2d 530 (2nd Dept. 1966) do support the principle that the:

> "...Court has power, however, to deny a party the right to interpose the defense of the Statute of Limitations where such party's conduct would render the assertion of the defense inequitable (General Obligations Law, Section 17-103 Sub. Div. 4 par. b)..." Ryan Ready Mixed Concrete Corp., supra, at 531,

the principle in Erbe v. Lincoln Rochester Trust Company, supra, and Ryan Ready Mixed Concrete Corp. v. Coons, supra, concerning the application of equitable estoppel to the interposition of the defense of the statute of limitations herein simply does not apply as was recognized by the District Court in granting Appellees Motion to Dismiss.

Appellants cited to the District Court the decision in Ryan Ready Mixed Concrete Corp. v. Coons, supra, which cites therein

the decision in Erbe v. Lincoln Rochester Trust Company, supra, thus it is reasonable to conclude that the District Court on the briefs, pleadings, depositions and affidavits before it, found no basis which would justify the application of the doctrine of equitable estoppel to bar the imposition of the defense of the Statute of Limitations to any or all causes of action asserted in the second amended complaint herein.

The Court below undoubtedly relied upon the rule espoused by the New York Court of Appeals in Higgins v. Crouse, 147 N.Y. 411 (1895) which held that:

> "...where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, he shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. He will be held, for the purposes of the statute of limitations, to have actually known what he might have known and ought to have known." (147 N.Y. at 416).

Having written to Appellee Brady, and questioned Brady's alleged failure to fulfill the purported promises or contract in question, and having received no response, and having been aware from May 12, 1966 of the requirements for obtaining pension credit Appellant should have been deemed to be held for the purposes of the statute of limitations to have actually known from the outset that the alleged promise would not be fulfilled. (78 a, 79 a, 48 a, 50 a).

As the New York Court of Appeals noted in Higgins v. Crouse, supra, at 416:

> "Can a party so situated omit all investigation, remain purposely blind, neglect the duty of inquiry, when reasonable and natural action would reveal the truth and dispose the fraud? I think not. In such a case it seems to me that we are bound to impute to the party the knowledge which he ought to have had and would have had if he had done his duty, and save for the purposes of the Statute of Limitations that there was in law discovery of the facts which constitute the fraud. Certainly there was a discovery of some of them, and the party should be charged with the knowledge of the rest or he might and should have known them."

The doctrine of equitable estoppel is based in general upon the theory that:

> "...a party is absolutely precluded, both at law and in equity from denying, or asserting the contrary of, any material fact which by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereof, as a consequence reasonably anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed." (21 N.Y. Jur.Estoppel, Ratification and Waivers, Section 15).

An estoppel must be certain to every intent, and not be taken by argument or inference. Mason v. Alston, 9 N.Y. 28 (1853). The doctrine is highly penal and is strictly guarded and carefully applied and only when the grounds for its application are clearly and satisfactorily established. Smith v. Varra, 136 Misc. 500 (1930).

Since the Appellant herein testified in his deposition that he was aware as early as May 12, 1966 of the requirements to obtain pension credits under the District 2 MEBA Pension Plan, it would be unjust and beyond rational limits to apply the doctrine of equitable estoppel in these circumstances.

Moreover, public policy as prescribed by statute, may not be nullified or rendered ineffective by applying the doctrine of equitable estoppel. 21 N.Y. Jur. Estoppel, Ratification and Waivers, Section 15; Railway Express Agency Inc. v. Gleason, 2 Misc. 2d 368 (1956).

If this Court were to invoke and apply the doctrine of equitable estoppel it would effectively negate the requirements of federal law regarding the establishment of jointly administered Taft-Hartley trusts and provision therein for attainment of pensions and the determination of eligibility for such pensions by written agreements signed, ratified, or adopted by employers. Moglia v. Geoghegan, 403 F. 2d 110 (2d Cir. 1968).

For these reasons the doctrine of equitable estoppel sought to be asserted by the Appellant herein to bar the imposition of a defense of Statute of Limitations should be rejected, and the decision of the Court below affirmed.

POINT IV

THE COURT BELOW HAD A BASIS IN FACT AND LAW FOR FINDING THAT APPELLANT HAD AN OBLIGATION TO SEEK A CERTIFICATION OF HIS PENSION CREDITS FROM THE PENSION PLAN ON NOVEMBER 16, 1966 IF HE WISHED TO ENFORCE THE ALLEGED AGREEMENT MADE BY APPELLEES WITH HIM WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

Appellant's argument in POINT IV of his brief (Appellant's Brief, page 17) is quite similar to the argument advanced in POINT I, suggesting implicitly, if not explicitly, that the agreement sought to be enforced, could be enforced in a reasonable time which did not commence on November 16, 1966.

Contrary to the Appellant's assertion that there is nothing in the record to support the Court's finding that Appellant had an obligation to seek a certification of his pension credits from the Pension Plan immediately after the picketing ended on November 16, 1966, the affidavit of Thomas J. Mackell, Jr. (82 a) clearly reveals the importance of certification of pension credits, since such a certification enables the individual to rely on the same and permits his beneficiaries to rely on the certification to establish the amount of pension credits the individual has under the Plan's Trust Indenture and Rules and Regulations.

Appellant again engages in speculation in suggesting that his reliance on the Pension Plan certification was optional since he knew pension credits would normally be accrued by virtue of employment by employers under contract with the MEBA. (48 a, 49 a, 50 a).

Appellant engages in idle speculation in suggesting that he saw no need to ascertain pension credits because he believed Appellees' promise. Appellant's Brief, p. 17. His reliance was not at all understandable in light of his prior knowledge of the requirements for accruing pension credits under the District 2 MEBA Pension Plan. (48 a, 50 a). Appellant knew from at least May 12,

1966 and certainly by November 16, 1966 that Appellees' alleged promises represented a substantial departure from the manner in which pension credit was accrued under the District 2 MEBA Pension Plan. (48 a, 50 a). In such circumstances Appellant's suggestion to this Court that his reliance was entirely understandable in view of the fact that the promises were in writing and unequivocal is clearly unwarranted speculation. Appellant's Brief, p. 17).

Appellant's reliance on Lowe v. Feldman, 11 Misc. 2d 8, (S. Ct. N.Y. Cty. 1957), in support of his contention that there was no basis in fact or law for the District Court's finding, that Appellant had an obligation to seek a certification of his pension credits with the Pension Plan on November 16, 1966, is wholly misplaced. Lowe v. Feldman, supra, involved a suit by a union member who had worked as a union member in employment for contracted employers in an industry for more than twenty-five (25) years; the member had been declared ineligible for a pension because he had been a part-time worker and the union's Executive Board had exercised its alleged discretion to deny him a pension in spite of acceptance of his dues for more than twenty-five (25) years which dues, had in part, been turned over to the pension fund.

Appellant has made an unsupportable attempt to have this Court find that the facts in Lowe v. Feldman, supra, are sufficiently analogous to the facts in this case to warrant reversal of the District Court finding that the Appellant had every right as well as an obligation to seek certification of his pension credits from the Pension Plan immediately after the picketing ended on November 16, 1966.

There is no dispute that in this case Appellant had accrued less than one (1) year of pension credits as of September, 1967 (82 a), despite his membership in MEBA since at least 1958. (t. a, 14 a). In view of Appellant's professed awareness as of May 12, 1966 of the basis upon which pension credits were earned under the District 2 MEBA Pension Plan, that is, by employment by employers under contract with District 2 MEBA (48 a, 49 a, 50 a), it is wholly incomprehensible that Appellant would see no need to obtain pension certification at the earliest opportunity after fulfilling his alleged obligations under the purported agreement between himself and Appellees McKay and Brady regarding past service credits arising from his employment by Cities Service Tankers Corp.

Appellant had, as the District Court noted in dismissing his first cause of action in the second amended complaint herein,

> "...every right to attempt enforcement of the defendants alleged promises as early as November 16, 1966. He was free to attempt enforcement of defendants promises to provide plaintiff with full credit for his past service. He was free to commence an action immediately upon his fulfillment of picket duty in Alabama. His obligation was to seek a certification from the Pension Plan which would have informed the plaintiff of his credits, and then be able to sue for credits for past service if denied by virtue of the alleged promises of the defendants." (28 a, 29 a).

By failing to exercise his right to ascertain his pension credits on or after November 16, 1966 and enforce the alleged promises of the appellees, Reginald Schmidt should be deemed time barred from pursuing the first cause of action in the second

amended complaint. The finding by the District Court on this issue was clearly correct.

POINT V

APPELLANT SUSTAINED DAMAGE AND HENCE HAD A CAUSE OF ACTION AS SOON AS HE COMPLETED HIS PICKET DUTY IN MOBILE, ALABAMA ON NOVEMBER 16, 1966.

Appellant seeks to convince the Court that the District Court's Order granting the Appellees' Motion to Dismiss on the ground that Reginald Schmidt failed to commence action within the applicable Statute of Limitations on his claim of breach of contract should be rejected on the theory that the breach of the alleged promises did not result in any immediate harm, citing Lewis v. Lewis, 59 Misc. 2d 525, (N.Y. City Civil Court, 1969) and Ryan Ready Mixed Concrete Corp. v. Coons, 25 A.D. 2d 530 (2nd Dept. 1966). Appellant's Brief, pp. 19, 20.

While the principles of law espoused in these cases is correct, in that there are instances where a claim for breach of contract arises not upon the breach but on the occurrence of the harm engendered by the breach, the facts in this case simply do not justify application of that principle.

In the instant matter, Reginald Schmidt did suffer an immediate and substantial harm by the failure of Appellees McKay and Brady to attempt fulfillment of the alleged promises contained in the letters signed by Appellee McKay which are annexed to the Complaint and incorporated by reference in the Second Amended Complaint herein. (7 a, 8 a, 9 a). Since Appellees did not promptly undertake to satisfactorily conclude with the Trustees of the District 2 MEBA Pension Plan an arrangment permitting the Plan to pick up all past service credit of any engineer who supported District 2 MEBA in its action against the violation of the election agreement; or in the event that this arrangement was not accomplished, by District 2 MEBA making appropriate contributions in behalf of the engineers supporting District 2 MEBA in its action with a result that the past service credits of the engineers supporting District 2 MEBA would be totally accredited to their accounts for pensions, Reginald Schmidt has suffered a substantial harm by being required to continue to work in the maritime industry, which would have been unnecessary if Appellees' alleged promises had been promptly performed.

There was immediate harm to Schmidt from the alleged breach as can be seen from the language of the Second Amended Complaint filed in Plaintiff's behalf. (9 a, 10 a) (Second Amended Complaint, para. 12) The allegations of the Second

Amended Complaint must be accepted as true in considering the decision of the District Court granting Appellee's Motion to Dismiss. 2A Moore's Federal Practice, ¶12.08, Gardner v. Toilet Goods Association, 387 U.S. 167 (1967); Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

The harm that flowed to Reginald Schmidt from breach of the alleged contract with Appellees can readily be seen to include loss of opportunity to obtain a pension from Cities Service and loss of income from forsaking employment with Cities Service. (51 a, 55 a, 58 a, 59 a, 60 a; 9 a, 10 a , (Second Amended Complaint, paragraph 12), Deposition of Reginald Schmidt, pgs.77, 110.

Thus, contrary to the Appellant's claim that he suffered no harm from Appellee's alleged breach prior to his 1971 retirement, the record is replete with evidence to the contrary. (9 a, 10 a , (Second Amended Complaint, paragraph 12);(55 a, 51 a); Deposition of Reginald Schmidt, pgs. 77, 110.

Additionally, if Reginald Schmidt had sought certification of his pension credit in 1967, at the time of his letter to Appellee Brady, (56 a, 57 a), he would have been in a position to attempt to enforce the Appellees alleged promises at a time when he had already fulfilled the minimum years of service required to to receive a normal pension from the Plan.*

* This assumes, arguendo, Schmidt could have enforced the alleged promises he now seeks to enforce. His letter of September 22, 1967 to Brady (56 a, 57 a) reveals Schmidt's awareness of the opportunity to obtain certification of his pension credits. Schmidt then would have been able to determine for himself whether he wished to increase his normal pension above the 20 year minimum by continuing to work under District 2 MEBA contracts, or seeking other employment opportunities in or outside the maritime industry.

Also, Schmidt would not have suffered the loss of four (4) years of pension benefits from 1971 to 1975 as a result of the break in service he incurred by retiring in April, 1971 without knowing in advance that he had not received credit for the employment he had previously had with Cities Service. (83 a, 84 a, para. 13).

Thus, there is ample ground for this Court to conclude that Schmidt suffered immediate harm from the alleged breach of the contract he now seeks to enforce. This harm could have been avoided if he had sought pension credit and sought to enforce the agreement on November 16, 1966 at the time the alleged condition to implementation of the agreement was fulfilled and the agreement, if any, would have become operative.

As can be seen more fully from the affidavit of Thomas J. Mackell, Jr., Administrator, District 2 MEBA Pension Plan, (81 a, 82 a, 83 a, 84 a) individuals who are covered by the Plan can obtain pension certifications from the Administrator of the Plan periodically. When this is done the individual accruing pension credits will be aware of the amount of pension credits he has accumulated and will be in a position to determine for himself how much additional employment he must undertake under contracts between District 2 MEBA-AMO, AFL-CIO and its contracted ship operators before he would be eligible to receive a pension.

While Reginald Schmidt concededly knew the requirements of the District 2 Pension Plan in order to accrue pension credit in employment with a District 2 contracted employer as early as May 12, 1966 (48 a, 50 a), he suffered a real and substantial harm assuming, arguendo, the validity of the Appellees' promises, by failing to ascertain as soon as possible or periodically after November, 1966 what, if any, pension credits due him for his service with Cities Service as a licensed engineer had been credited to his account in the District 2 MEBA Pension Plan.

Thus, the Appellant's reliance on Ryan Ready Mixed Concrete Corp. v. Coons, supra and Lewis v. Lewis, supra, is misplaced.

As the Appellate Division, Second Department noted in Ryan Ready Mixed Concrete Corp. v. Coons, 25 A.D. 2d 530 (2d Dept. 1966):

> "...There are cases in which the breach and the accrual of the cause of action are not simultaneous. The statute commences to run from the time when the Plaintiff is first enabled to bring his action." (Cary v. Koerner, 200 N.Y. 253, 259; Edlux Construction Corp. v. State of New York, 252 App. Div. 373).

Not only is there absolutely no reason why Reginald Schmidt

was not enabled to bring this action in 1966 following performance of the picket duty he undertook in Mobile, Alabama, but he had an obligation to do so. His failure to do so resulted in the real harm of having to work for a number of years without knowing how many additional years pension credit, if any, he would or could receive by virtue of Appellee's alleged promises.

There is no anticipatory breach by the Appellees, as claimed by Schmidt, since the time for performance of Appellee's alleged promises was immediate following fulfillment by Schmidt of the conditions precedent to the alleged contract becoming operative.

POINT VI

THE DISTRICT COURT CORRECTLY FOUND THAT REGINALD SCHMIDT COULD HAVE DISCOVERED THE FRAUD WITH REASONABLE DILIGENCE COMMENCING NOVEMBER 16, 1966.

Appellant boldly argues in Point VI of his brief that the failure of Appellees to take any action on their promise before Appellant's 1971 Application to the District 2 MEBA Pension Plan was entirely consistent with a good faith intention to perform. (Appellant's Brief pg. 20)

> "There was no way plaintiff would have discovered the fraud before he was actually denied a pension in 1971." (Appellant's Brief p . 20)

Appellees respectfully maintain that the assertion of Appellant just quoted is incorrect and belies the evidence in the record which was before the District Court at the time the Court entered the Order of Dismissal of Appellant's third cause of action herein.

Scrutiny of the Second Amended Complaint herein reveals that Appellant's third and final cause of action is premised on a claim that:

> "McKay and Brady, when making the promises on behalf of the class set forth in paragraphs 7, 8 and 9 hereinabove, had no intention of fulfilling them or attempting to fulfill said promise, and wilfully misrepresented their states of mind in this respect to plaintiff with the intention that he rely on said misrepresentations to his detriment and to the benefit of McKay, Brady and the other members of the class". (11 a, 12 a) (Second Amended Complaint, paragraph 24)
>
> "Plaintiff reasonably relied on said misrepresentations to his detriment, as described in paragraph 10 through 13 hereinabove." (12 a) (Second Amended Complaint, paragraph 25)

CPLR § 213 sub. 9 expressly prescribes a statute of limitations of six (6) years for:

> "an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could, with reasonable diligence, have discovered it."

In Reginald Schmidt's deposition he admits knowing the requirements for receiving a pension from the District 2 MEBA Pension Plan no later than May 12, 1966. (48 a, 49 a, 50 a)

Moreover, Reginald Schmidt was aware as early as 1966 of his right to verify whether or not the so-called promises made to him by Appellees in the Exhibits annexed to the Second Amended Complaint herein were being acted upon or fulfilled by Appellees. (46 a, 51 a, 73 a, 75 a). In spite of this awareness, Appellant chose to allow the six (6) year Statute of Limitations to run from November 16, 1966, when he fulfilled the conditions requisite to invoking his claim for pension credit against Appellees.

Since Reginald Schmidt maintains that the fraud alleged in the third cause of action herein was actual fraud or misrepresentation, the period of limitations applicable thereto is the six (6) year period prescribed in CPLR § 213 (9).

Under CPLR § 13, paragraph 9, the six (6) year statute commences to run from the time the Appellant or the person under whom he claims discovered the fraud or could, with reasonable diligence, have discovered it. Thus, Appellant's action for "fraud" or "misrepresentation" should have been commenced no later than six (6) years after November 16, 1966, when he had fulfilled the condition precedent to invoking the obligations of Appellees under the purported agreement, but did not ascertain his pension credits from the District 2 MEBA Pension Plan or that Appellees had performed as promised.

The granting of summary judgment to Appellees on the third cause of action in the Second Amended Complaint is thus justified. See Rutland House Associates, Respondent v. Philip B. Dannof, Appellant, 37 App. Div. 2d 828 (1st Dept. 1971)

In Rutland House Associates, Respondent v. Philip B. Dannof, Appellant, supra, the Appellate Division, First Department unanimously reversed the denial of a motion for summary judgment in an action for fraud which had allegedly been committed in August, 1964 where the action had not been commenced until December 28, 1970. There, as in the instant case, the plaintiff had or could have had knowledge of the alleged fraud within a short time after commission, but didn't bring an action for fraud within the six (6) year period of the statute or two (2) years after actual or imputed discovery; as a result, the institution of the action in December, 1970 was deemed time barred.

Appellees maintain that Appellant's reliance on Erbe v. Lincoln Rochester Trust Company, 3 N.Y. 2d 324 (1957) in support of these contentions is misplaced since they have, in fact, demonstrated that Schmidt was aware of the facts from which the alleged fraud or misrepresentation might reasonably be inferred by reason of his knowledge of the requirements for accruing credit under the Pension Plan (48 a, 50 a), knowledge of the Pension Plan itself (48 a); and knowledge that the assurances of Appellees were not being implemented. (56 a, 57 a)

Higgins v. Crouse, supra at 416, cited by the New York Court of Appeals in Erbe v. Lincoln Rochester Trust Co., 3 N.Y. 2d 321 (1957) which is relied upon by Appellant in his Memorandum herein (Appellant's Brief pg. 20), states the applicable rule:

> "...where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, he shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. He will be held, for the purposes of the statute of limitations, to have actually known what he might have known and ought to have known."

In this case the Appellant's own letter demonstrates that he was fully aware that Appellee Brady, as an officer of District 2 MEBA, had not caused Reginald Schmidt's time with Cities Service to be included in computing his pension credits for retirement, contrary to the alleged promises contained in the letters which are annexed to the original complaint filed herein and incorporated by reference in the Second Amended Complaint herein. (78 a, 79 a, 80 a)

Having written to Appellee Brady and questioned Brady's alleged failure to fulfill the purported promises or contract in question and having received no response, Schmidt should be deemed to be held for the purposes of the Statute of Limitations to have actually known what he might have known and ought to have known from the lack of response he received. He knew, also, from his letter to Brady the manner in which credit was certified and the details of the Plan itself. (46 a, 56 a, 57 a).

As quoted in Higgins v. Crouse, supra, at 416:

> "Can a party so situated omit all investigation, remain purposely blind, neglect the duty of inquiry, when reasonable and natural action would reveal the truth and dispose the fraud? I think not, in such a case it seems to me that we are bound to impute to the party the knowledge which he ought to have had and would have had if he had done his duty, and save for the purposes of the Statute of Limitations that there was in law discovery of the facts which constitute the fraud. Certainly there was discovery of some of them, and the party should be charged with the knowledge of the rest or he might and should have known them."

Certainly the inquiry that Reginald Schmidt concededly made in a writing addressed to Appellee Brady as Secretary-Treasurer of the Union involved should, since it went unanswered, be deemed sufficient, when combined with his prior knowledge of the Plan and securing of pension credits under the Plan to have obligated Schmidt to commit himself to a further investigation and ascertain the knowledge which he ought to have had and would have had if he had simply inquired of the Administrator of the Plan, at that time or anytime on or after November 16, 1966, whether or not the alleged promises of Appellee McKay were fulfilled.

Having failed to do so the Appellant's Third Cause of Action of Fraud must be deemed to have been properly dismissed by the District Court since it was commenced outside the applicable Statute of Limitations which commenced to run on November 16, 1966.

POINT VII

ASSUMING, SOLELY ARGUENDO, THE VALIDITY OF APPELLANT'S SECOND CAUSE OF ACTION FOR PROMISSORY ESTOPPEL, THE DISTRICT COURT CORRECTLY DISMISSED THIS CAUSE OF ACTION SINCE IT WAS COMMENCED AFTER THE APPLICABLE NEW YORK STATUTE OF LIMITATIONS HAD RUN.

Assuming, arguendo, the validity of the second cause of action for promissory estoppel in the second amended complaint herein, (11 a)* this cause of action was properly found by the District Court to be subject to the same affirmative defense, that is, that it was barred by the applicable New York Statute of Limitations. (29 a)

CPLR Section 213 does not contain a specific period of limitation for the equitable doctrine of promissory estoppel, but does contain an omnibus statute of limitations in Section 213.1, which provides that:

> "The following actions must be commenced within six (6) years:
> 1. An action for which no limitation is specifically prescribed by law;..."

The Practice Commentaries which analyze and discuss CPLR Section 213 plainly suggest that the omnibus period quoted, supra, govern actions in equity. CPLR Section 213, CPLR Section

*See Moglia v. Geoghegan, 267 F Supp. 641 (S.D.N.Y. 1967), affirmed, 403 F 2d 110 (2nd Cir. 1968), cert. denied 394 U.S. 919 (1969).

213.1. cf. Gilbert v. Meyer, 362 F. Supp. 168 (S.D.N.Y. 1968) Accepting the allegations of the second cause of action in the second amended complaint herein as true, for the purpose of the Motion to Dismiss, the promises described in paragraphs 7 through 9 of the second amended complaint (8 a, 9 a) were allegedly relied upon by Reginald Schmidt as a basis for undertaking:

> "...substantial and definite action to his detriment and to the benefit of the class as set forth in paragraphs 10 through 13 hereinabove." (11 a) (Second Amended Complaint,paragraph 20)
>
> "Injustice can be avoided only by enforcement of said promises against McKay, Brady and the other members of the class..." (11 a) (Second Amended Complaint, paragraph 21)

Reginald Schmidt first took the actions he did as described in paragraphs 10 through 13 of the second amended complaint no later than November 16, 1966, and the statute of limitations was therefore properly deemed by the District Court to have commenced running at that time as to Schmidt's claim of promissory estoppel in the second cause of action in the second amended complaint herein.

The estoppel, if it existed, must be deemed to have arisen when a party is precluded from denying or asserting the contrary of:

> "...any material fact which by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereof, as a consequence reasonably anticipated, changing his position in such a way that he should suffer injury for such change or contrary assertion." 21 N.Y.Jur., Estoppel, Ratification and Waiver, Section 15.

From Schmidt's testimony in his deposition in this matter, there is no question that, if his actions in reliance on Appellee's representations occurred and he changed his position in such a way that he would suffer injury if Appellees were permitted to change their purported assertions, such actions and such changes would have occurred no later than November 16, 1966. (39 a, 40 a, 41 a, 42 a, 43 a, 44 a, 45 a, 46 a, 47 a).

In these circumstances, Reginald Schmidt's cause of action in estoppel clearly commenced to run at the time he purportedly changed his position in reliance on Appellees' so-called promises or representations. This change in position occurred from Schmidt's own testimony in his deposition, no later than November 16, 1966. (39 a, 40 a, 41 a, 42 a, 43 a, 44 a, 45 a, 46 a, 47 a).

For these reasons, the District Court was correct in granting Appellee's Motion to Dismiss the Second Cause of Action in the Second Amended Complaint herein since more than six (6) years elapsed from November 16, 1966 when the cause of action arose to the date when the original complaint was filed in this matter.

CONCLUSION

The Judgment and Order of the District Court dismissing the Second Amended Complaint herein should be affirmed.

Respectfully submitted,

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Service of ~~three~~ Two (2) (3) copies of the within BRIEF is admitted this 10th day of Dec. 1976

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